Supreme Court, U.S.
FILED

05145 MAY 10 2006

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No. 05-

In the Supreme Court of the United States

SHANNON MCCULLOUGH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. **Whether Ms. McCullough was denied her sixth amendment right to the compulsory process of a witness on her behalf, by the district court's requiring her to demonstrate the additional and new element of bad faith in the United States removal of an illegal alien witness?**

After soliciting a statement from Rosalio Venegas that implicated McCullough in illegal activity, the United States allowed Venegas to leave the U.S. without following any of the normal removal or deportation proceedings. When McCullough objected to this violation of her Sixth Amendment right to have Venegas be a witness for her defense at trial, the District Court applied an additional and new element to the Valenzuela-Bernal, *infra*. test and required Appellant to demonstrate that the Government acted in bad faith in deporting Venegas.

PARTIES BELOW

1. Daryl Atchinson, Assistant United States Attorney
2. Leigh A. Pipkin, Assistant United States Attorney
3. Rob Ratliff, Appellate counsel for Ms. McCullough
4. Riguer L. Silva, Trial counsel for Ms. McCullough
5. Honorable Charles R. Butler, United States District Judge

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The Petitioner, Shannon McCullough, respectfully prays that a Writ of Certiorari be issued to review the denial of the Eleventh Circuit Court of Appeals, which denied the Petitioner's appeal on February 14, 2006.

OPINION BELOW

The original order of Eleventh Circuit Court of Appeals was entered on February 14, 2006 in an unpublished opinion under the caption United States of America v. Shannon McCullough, Case Number 05-13206. The decision is attached hereto at Appendix 1a.

JURISDICTION

The final judgment of the Eleventh Circuit Court of Appeals was entered on February 14, 2006. This Petition for Writ of Certiorari has been filed and docketed within the time limits prescribed. The jurisdiction of this Court is properly invoked, since the United States Supreme Court has the authority to review final decisions of the Eleventh Circuit Court of Appeals.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution states in pertinent part that "no person shall be deprived of life, liberty, without due process of law." The Sixth Amendment to the United States constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy trial and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted by witnesses against him;

to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

Petitioner was indicted in a two count indictment returned by a grand jury sitting in the Southern District of Alabama on July 29, 2004. Count I of the Indictment charged Petitioner with Transportation of an Illegal Alien in violation of 8 U.S.C. § 1324(a)(1)(A)(ii). Count II charged Petitioner with Harboring and Concealing an Illegal Alien in violation of 8 U.S.C. § 1324 (a)(1)(A)(iii). The illegal alien in question was Rosalio Venegas (Venegas), the Petitioner's boyfriend and fiancé at the time.

Petitioner entered a plea of not guilty to the charges and was released on bond pending trial. Prior to trial, trial counsel for Petitioner, Riguer Silva (Silva) filed a motion to quash the indictment due to the United States' actions in allowing Venegas to voluntarily depart from the United States 2 months prior to the indictment issuance. (R.23, Motion to Quash) The United States responded swiftly, arguing that Venegas was removed in good faith. (R. 26, United States Response to Motion to Dismiss).

The Court heard oral arguments on this motion on November 30, 2004, immediately proceeding the start of trial. (Trans. Vol. I, pp.1-22) The Court ultimately denied Petitioner's motion to dismiss. The trial judge found that the United States had not acted in bad faith at the time Venegas was allowed to leave. The matter proceeded to bench trial before Judge Charles Butler.

At the conclusion of trial, Petitioner was found guilty by Judge Butler of both counts of the indictment. (Trans. Vol.

VI, pp. 334-36) A presentence investigation report was ordered prepared and Court was adjourned.

On January 5, 2005 Petitioner retained current counsel, Robert Ratliff (Ratliff) to represent her at sentencing. Sentencing was ultimately held on May 26, 2005. The Presentence Investigation calculated an adjusted offense level of 11, and a criminal history score of I, and recommended a guideline sentencing range of 8-14 months. At sentencing, Judge Butler agreed a non-guideline sentence was appropriate and sentenced Appellant to one day incarceration, followed by four months home confinement. (Sent. Trans. P. 15-16).

A timely notice of appeal was then filed. (R. 53, Notice of Appeal) Petitioner then brought the instant issue to the attention of the Eleventh Circuit Court of Appeals. The decision of the trial judge was affirmed without oral argument and by per curiam opinion on February 14, 2006. (Appendix 1a)

REASONS FOR GRANTING THE WRIT

In the instant matter, it is beyond question that the Petitioner was denied access to the Government's principle witness Venegas. Although the Sixth Amendment clearly states that defendants have the right to compulsory production of witness on their behalf at trial, the District Court added an additional element, requiring the Defendant to demonstrate that the United States acted in bad faith, in depriving Defendant her Sixth Amendment right to compulsory process.

This element of bad faith was newly created by the Eleventh Circuit and constitutes a significant departure from prior Supreme Court ruling on this issue. Thus the United States was permitted to allow the key witness to voluntarily

leave the United States, a process well outside the normal removal proceedings for similar cases, then defeat Petitioner's Sixth Amendment claims by arguing that she could not demonstrate the United State's had acted in bad faith.

ARGUMENT

I. MS. MCCULLOUGH WAS DENIED HER SIXTH AMENDMENT RIGHT TO THE COMPULSORY PROCESS OF A WITNESS ON HER BEHALF, BY THE DISTRICT COURT'S REQUIRING HER TO DEMONSTRATE THE ADDITIONAL ELEMENT OF BAD FAITH IN THE UNITED STATES REMOVAL OF AN ILLEGAL ALIEN WITNESS.

The Sixth Amendment to the United States Constitution guarantees a criminal defendant compulsory process "for obtaining witnesses in his favor." U.S. Const. Amend. VI. Further, the Supreme Court has held that this right of compulsory process is a fundamental element of the Fifth Amendment right to due process of law. See Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967), U.S. Const. Amend V. In the instant matter, after obtaining the statement of the Petitioner's paramour Venegas, the United States swiftly removed Venegas from the Country and thus deprived Petitioner of a material and vital witness to her defense.

In the context of illegal alien witnesses, and whether the deportation of illegal aliens violates a defendant's 5th and 6th Amendment rights, the Supreme Court has clearly spoken. In United States v. Valenzuela-Bernal, 458 U.S. 858, 102 S.Ct 3440, 73 L.Ed.2d 1193 (1982) the Supreme Court established the test to determine whether a 6th Amendment violation occurs when the Government deports an illegal alien before

defense counsel has an opportunity to interview the alien. The Valenzuela-Bernal Court was burdened with two competing interests, the Government's interest in deporting illegal aliens, and a defendant's right to have that alien present for trial. The Court ultimately ruled that in order for a defendant to burden the United States with maintaining an illegal alien in this country, the defendant must make a sufficient showing that the alien would provide evidence that would be "material and favorable to his defense, in ways not merely cumulative to testimony of available witnesses." Id. At 873. The Supreme Court went on to conclude that sanctions, in the form of dismissal of the indictment may be proper when there was merely a "reasonable likelihood that the testimony could have affected the judgement of the trier of fact" Id. At 873-74.

Prior to trial, Petitioner moved the Court to dismiss the indictment based on the Government's actions which resulted in Venegas being unavailable for trial. (R.23, Motion to Quash). In an affidavit appended to his motion, trial counsel relayed to the Court the substance of his conversation via phone with Venegas. Silva confirmed in his affidavit that Venegas told him, he was threatened with lengthy incarceration and coerced into making a statement. (R. 26) Venegas stated that his statement was false and made because "Agent Douglas would not accept the truth about [McCullough's] involvement in this case." (R.23) Venegas further stated that Petitioner had no knowledge that he had returned illegally to the U.S. or did not have permission to be here. Id.

The United States responded to this motion by arguing that the Petitioner could not meet the required showing for a 6th Amendment Compulsory process violation. The United States argued that the Petitioner could not show a reasonable

basis to believe Venegas would offer any material or favorable evidence in light of the affidavit made by Venegas prior to his removal. Additionally, the Government interjected an additional element of bad faith, by arguing that the Petitioner could not show the United States acted in bad faith in removing Venegas. Lastly, the Government stated that despite these failings, they did offer to allow Venegas to return to the United States prior to trial. (R. 26)

In denying relief, the Court largely seized on one key argument of the Government's opposition, the element of bad faith. The Court repeatedly sought from Counsel Silva, some indication that the Government had acted in bad faith in deporting Venegas (Trans. Vol. I, p. 5-8) Based largely on this failing of Petitioner to demonstrate some bad faith, the Court ultimately rejected Petitioner's motion to quash the indictment. (Trans. Vol. I, p.21).

Certainly there exists some caselaw that indicates that a defendant must show the Government deported an alien in bad faith, in order to demonstrate a 6th Amendment compulsory process violation. But that language is scattered through a variety of appellate opinions, and is nowhere to be found in the Supreme Court's decision in Valenzuela-Bernal. *See generally,* United States v. Chaparro-Alcantara, 226 F.3d 616, 623-24 (7th Cir.), cert. denied, 531 U.S. 1026, 121 S.Ct. 599, 148 L.Ed.2d 513 (2000); Iribe-Perez, 129 F.3d 1167, 1173 (10th Cir. 1997); United States v. Dring, 930 F.2d 687, 693-94 (9th Cir.1991), cert. denied, 506 U.S. 836, 113 S.Ct. 110, 121 L.Ed.2d 68 (1992); Buie v. Sullivan, 923 F.2d 10, 11-12 (2nd Cir.1990); United States v. Nebraska Beef. Ltd., 194 F.Supp.2d 949, 957 (D.Neb.2002), California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984), and Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988). But importantly, this bad